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WAR PRICES EXCUSING PERFORMANCE OF EXECUTORY CONTRACTS.

Two articles appearing lately in Central Law Journal, one entitled "Effect of War on Contracts — Questions in the British Courts," 85 Cent L. J. 442, and the sequel thereto: "The War and Contracts—Economic Impossibility Excusing Breach," 86 Cent. L. J. 224, have attracted some attention among the subscribers to this journal, as letters to our Editorial Department attest.

These articles are by our correspondent in Scotland, Mr. Donald Mackay, and show that English courts hold quite strictly to the rule that "where there is a positive contract to do a thing, not in itself unlawful, the promissor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance has become unexpectedly burdensome or even impossible."

War causes fluctuation in prices, greatly advancing them in some things and, possibly, destroying markets in other things. If the war, that brings this about, is a foreign war, generally it may be said that this is a circumstance that would come under the rule above stated. When it is a war by the country of one of the contracting parties, another principle may apply, and that is the status of the other party may either discharge from further performance or put the matter in abeyance until peace resumes her sway. But whether a war is a foreign war, pure and simple, or whether it is a war by the country of the contracting parties or by one or more, less than all, of such parties, there may come about an absolute or partial disappearance of the subject matter of the contract.

It is generally true that both parties to an executory contract contemplate that when time for fulfillment of contract obligations shall arrive the subject-matter out of which fulfillment is to be made shall be in existence. Exceptions stated in contracts as excusing performance pointedly are based on such existence and are taken as specifying things which add to burden of performance. The ordinary rule in construing exceptions is *Expressio unius est exclusio alterius.*

But Mr. Mackay, in his admirable articles above referred to, fails to call attention to a recent important British case which is so very instructive on the line referred to, and as exhibiting a modification of the strict principle of cesser of the subject-matter of an executory contract, that we refer to it quite extensively in this editorial. Tennants (Lancashire) Ltd. v. C. S. Wilson & Co., Ltd. 116 Law Time Reports, 780. This was an appeal from Court of Appeals reversing judgment of trial court for plaintiff, which reversal was in turn set aside by the House of Lords and the ruling of the trial court restored. The House of Lords reversed unanimously a majority in the Court of Appeals.

The facts show that the contract was made prior to the breaking out of war between Great Britain and Germany, on August 4, 1914; that it concerned deliveries by defendant of chloride of magnesium during 1914 and 1915, and its cancellation ten days after the breaking out of war. At that time plaintiff had a number of contracts with others for delivery of magnesium based on its contract with defendant. After demand by plaintiff for delivery, it appears that, nothwithstanding refusal to furnish the magnesium, defendant notified plaintiff that the price of magnesium had advanced but it filled orders for others at advanced prices. Plaintiff stood on the contract. Defendant conceded that "there was no cancellation, but a suspension of deliveries under contract." Plaintiff claimed damages for refusal to deliver at the times

provided for and at the prices fixed, by the contract.

Lord Loreburn said: "Defendants had to show that the war caused a short supply of magnesium chloride, which hindered delivery. By short supply is meant, I think, that the quantity available to the seller was substantially less than his requirement. By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders. . . . The argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible . . . seems to me a dangerous contention, which ought not to be admitted, unless the parties have plainly contracted to that effect."

The opinion goes on to speak of the German source of supply, on which the sellers relied, being cut off by the war or as being greatly diminished temporarily, so that sellers could not have supplied plaintiff, even by paying higher prices, unless by disregarding "other contracts and other business necessities in order to satisfy" plaintiff. The opinion said that: "To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfill one surely hinders delivery."

Viscount Haldane said: "To say that a merchant is not prevented from delivering to a customer when he gets either none or an insufficient supply of the article from the manufacturer, but is only so prevented or hindered when there is an imposssibility or difficulty concerning the transport from him to the customer, would seem to me the height of absurdity."

Speaking of the difficulty or impossibility of delivery, it was said: "Where I think, with deference to the learned judges, the majority of the court below have gone wrong, is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. . . . If appellants had alleged nothing but advanced price they would have failed."

Lord Shaw said the hindrance was in "such a way as to interfere with the conduct in a full business sense of the appellants' trade in magensium chloride." This expression is somewhat more elastic than that by the other lords, but Lord Shaw goes on to say that "a mere fluctuation of price would not constitute" a hindrance.

Lord Wrenbury said: "There may be a rise of price without a shortage of supply. Rise of price is, I think, irrelevant, except that it may be evidence when coupled with other facts that there is a short supply."

It is true the lords were discussing specific exceptions excusing non-performance or suspension of perfomance, but there is nothing directly stated about shortage. There is a general clause following specific things, by way of exception, preventing or hindering the manufacture or delivery of the article. This clause would seem to be but a sort of form in all contracts and to be construed on the principle *ejusdem generis*.

What stands out in these opinions is the fact that mere change in prices caused by war cannot be set up for failure to deliver an article contracted to be delivered.

Mere rise in prices is no excuse for non-fulfillment. Also, it would seem that the fact that the shortage was caused by Great Britain's enemy was not a controlling fact. Any real shortage, however caused, would have had the same effect.

NOTES OF IMPORTANT DECISIONS.

DEAD BODIES—AUTOPSY BY OFFICIAL REQUIRED TO CERTIFY CAUSE OF DEATH.—The case of Woods v. Graham, et al., 167 N. W. 113, decided by Supreme Court of Minnesota, appears to us to stress unduly sentimental rights of relatives of a deceased in the latter's corpse.

Thus "syllabus by the court" in that case declares that: "It is no defense in an action

to recover damages caused by an autopsy performed on the body of the daughter of plaintiff, without the consent of the next of kin, that defendant or the attending physician was unable to ascertain the cause of death and performed the autopsy so as to be able to give a certificate as required by law, stating the cause of death."

This case shows the sustaining of a demurrer to defendant's answer and an affirmance of this ruling by the Supreme Court.

This answer set out that defendant was county physician, and attended decedent in a charity hospital; upon her death he was required to furnish to the official undertaker a certificate stating the cause of death, so that the undertaker could proceed with burial of the body. It was claimed by defendant that the autopsy he made was merely for the purpose of issuing such certificate, and that it was made in a decent and scientific manner and no incisions were made that were unnecessary. It appears that no notice was given to plaintiff of an autopsy to be made.

The State statute requires that no burial permit shall issue until proper certificate of cause of death shall be made and that any person having any duty in the premises must, on pain of being guilty of a misdemeanor, comply therewith.

The statute also makes it a misdemeanor to order dissection of a dead body except in cases "specially provided by statute," unless deceased by will authorizes it, or the coroner directs it, or the next of kin consents for the purpose of ascertaining the cause of death, and then only to the extent so authorized.

It seems to us that the statute contemplates action under wholly different circumstances The part regarding certificate for burial purposes concerns acts prior to burial and the other part is in reference to dissection, as well after as before burial. The latter, therefore, is not under the state's police power; the former is. As the answer was found to be defective because it did not show compliance with a part of the statute by which the county physician was not governed the demurrer was wrongly sustained. Suppose the mother in this case had been notified and she had refused to consent to autopsy? Should the daughter's body have remained unburied?

It may be that procedure under the second part of the statute might be for scientific purposes or to find clues in poisoning cases or for other reasons not necessarily within police power; the first part of the statute concerns nothing else than police power, and an honest attempt by an officer to comply with the statute ought to excuse him.

NUISANCE—NEGLIGENCE BY CONTRACTOR IN REPAIR OF A HIGHWAY.—The New Jersey Court of Errors and Appeals is, we believe, composed of more members than is any other judicial tribunal in this country. There sit on its bench 13 members, and in a recent case the judgment of a trial court, in non-suit, was affirmed by a bare majority of seven to six. Lydecker v. Board of Chosen Freeholders of Passaic, et al., 103 Atl. 251.

This case shows an action wherein plaintiff claimed that he was injured by a bicycle on which he was riding on a highway recently covered with oil. The contract for spreading the oil in certain quantities was made by the Freeholders with the Standard Oil Company, and the petition alleged that the oil was spread in such excessive quantities as to make the highway dangerous.

Considering the case as respects the Oil Company, the majority held that the mistaken estimate by the freeholders of what performance of the contract would entail could not be said to make the highway inherently dangerous or that the spreading of the oil as the contract provided was "obviously liable to create a nuisance."

The dissent was in a brief opinion, which said: "I think the declaration charged negligence in putting oil in excessive quantity upon a public highway and that it is unimportant that the right to place oil there at all came from the contract with the board of freeholders. The gravamen of the complaint is the negligence, not the breach of contract. The contract was only the occasion or condition, and the duty to exercise care, while it arose from the contract in this sense, was independent thereof, and was the ordinary duty not to create a nuisance in a highway. . . . I think the judgment in favor of the Standard Oil Company should be reversed."

The majority, also, found in favor of the freeholders, upon the theory that there was no active wrongdoing by them in the premises. What they were guilty of, if anything, was in acts of omission, and this part of the ruling appears to have been accepted by the minority. Therefore, the difference among members of the court seems in one on a highway for a lawful purpose doing what is inherently dangerous under professed authority, by a board authorized to contract in regard thereto, and the performance of that act being

negligent, because as so performed it violates the rights of one entitled to have a safe highway.

It is conceivable that, as to freeholders they or the county they represent should not be liable for mere error of judgment in executing their duties. This would be true, though the error might be gross, as long as good faith guides their course. But the majority appear to concede that gross mistake by them would prevent their discretion to a contractor employed by them, being set up in contractor's defense.

EMINENT DOMAIN—DEFINITENESS IN POINTING OUT PROPERTY SUBJECT TO.—It must be conceded, that the exercise of the right of eminent domain is "latent and potential," until a statute may make it "active and efficient." Collier on Public Service Companies, § 74. How definite therefore must be the statute which brings this "latent and potential" right into activity and effect?

This question is suggested by a recent decision by Pennsylvania Supreme Court in the case of Croyle v. Johnstown Water Co., 103 Atl. 303.

In that case a water company sought to condemn land for the purpose of supplying the territory in the vicinity of certain named boroughs with water. It was said: "Counsel for appellant rely upon the case of Bly v. White Deer Mt. Water Co., 197 Pa. 80, 46 Atl. 929. But there the water company attempted to supply water directly to the public in townships and municipalities, to which the charter did not admit it. In the present instance the supply of water to outside territory is incidental."

Also it was said: "But aside from this, as the court below very properly said: 'If the true purpose of this condemnation was to furnish a territory beyond the original charter limits, that is a matter to be inquired into by the State upon an appropriate proceeding, but not by bill in Equity under act June 19, 1871, at the instance of a private person.'"

It seems to us very doubtful whether it lies within Statutory bounds thus to cut off inquiry into the rightfulness of a taking by eminent domain. And when a purpose is called incidental to the main purpose this does not greatly help. It is possible thus for a public service corporation to take on more and more power by a sort of accretion, and thereby lands that were not within original grant of power to it become subject to the exercise of the right of eminent domain.

In this case it seems that five boroughs were consolidated into a city and the company supplied it and "incidentally" supplied territory in its vicinity. And it was held that the main purpose being satisfied it could supply persons outside as a mere incident to the main purpose. But this does not dispose of the question whether this supplying not being necessary to the main purpose, condemnation of property for the incidental purpose was within the grant of the right to exercise eminent domain. It seems to us that it was not. It does not fall within the principle, that powers expressly granted by implication embrace all that is necessary for its rightful exercise.

PROGRESS OF THE TORRENS SYSTEM OF LAND REGISTRATION.

Despite much organized opposition and the strong objection of title attorneys, the so-called Torrens idea of title registration seems to be making progress. At least it is a frequent subject of debate at Bar Association meetings. At the last meeting of the Alabama Bar Association a paper was read by Col. Sam Will John, of Massillon, Ala., who spoke in favor of the extension of the principle of title registration by providing for state insurance of titles. On this point Col. John said:

"There may be connected with, or embodied in such a law, provision for raising a Fund, which is called an 'Assurance,' 'Indemnity' or 'Insurance' Fund, but by whatever name it is called, the sole beneficial purpose of such a 'Fund' is to afford indemnity for lands lost by reason of the fraud, negligence, or mistakes of persons charged with the duty of administering the law, and it is in no sense an insurance of the title for the very heart-foundation of this system is the Governmental Register of Titles, which the Certificate of Registration is conclusive evidence of an indefeasible title, in fee simple. This feature is necessary to a fair, equitable law and I would not advocate the passage of a law, with it left out, though several States have such one-sided laws."

On the much-debated question of the constitutionality of such legislation, Col. John gave a resume of the cases and criticised

some of the provisions of the early acts; but he contended that when properly drawn to meet the peculiar constitutional limitations of our form of government, such legislation is in every respect suitable to our institutions, and its benefits should not be lost by objections that have no real merit or are based solely on prejudice. On this point Col. John continues:

"The death blow to the Ohio Statute did not deter the legislatures of Massachusetts, Illinois, Oregon, Washington, California, Colorado, Minnesota and New York and other states to the total number of 37, from enacting statutes for registering land titles. And there can be no doubt that the provisions of these statutes are well within the established principles governing bills to quiet titles.

"The power of the state to provide for the adjudication of titles to real estate, not only as against residents, but as against non-residents who might be brought into court by publication was distinctly upheld in a very strong opinion by Ch. J. White, in the case of American Land Co. v. Zeiss, 219 U. S. p. 47, and is strongly stated in the authorities he cites.

"Even a casual consideration of these authorities will convince any lawyer that a statute embodying the principles of the Torrens Act, adapted to our judicial system under the Constitution, is clearly within the power of the Legislature to enact."

In reference to objections to the propriety of a state competing with private individuals in the business of title insurance, Col. John said that the old idea that governments could not exercise any function that was not purely governmental had been practically superceded by the new principle of sociological jurisprudence, that it was the duty of the state to do anything for the welfare of its citizens which, for any reason they were not able to do for themselves. In upholding the right of every state to provide insurance funds not for the purpose of going into the insurance business but in support of some new remedy or of some new right created, the speaker cited the Supreme Court's approval of the Oklahoma statute providing for a guaranty fund to protect bank deposits,[1] and of the Washington statute providing for an insurance fund to guarantee payments under the Workmen's Compensation Law.[2]

Speaking of the practical working of such a law, Col. John said:

"The fees for registering titles and noting subsequent transfers, or liens, have usually been fixed at 1/10 of one per cent of the actual value of the property conveyed, and this small charge has produced a fund ample to cover all losses caused by any improper registration, and the surplus has enured to the benefit of the public treasury. After the first cost, which should be limited by law, the cost of subsequent transfers need not be more, or very little more than our fees for recording.

"A few years ago, no bank would lend on mortgage on land, but thanks to the last Congress, banks for the express purpose of lending to farmers on mortgage have been established and a land owner can now borrow money on land at low rates of interest and on long time. In states having a system of Governmental Registration of land titles land owners who avail themselves of it will have a distinct advantage over those who apply for Farm Loans and whose lands are not 'Registered.'"

A. H. R.

(1) Noble State Bank v. Haskell, 219 U. S. 104.

(2) Mountain Timber Co. v. Washington, 243 U. S. 319, 37 Sup. Ct. Rep. 260.

PROVIDING FUNDS THROUGH INSURANCE FOR PAYING ESTATE OR INHERITANCE TAXES.

The proverbial certainties, "Death" and "Taxes" have become concomitants under both State and Federal Laws taxing the estates of the dead. Death taxes, their amount, manner and moment of incidence and ways and means of payment are important considerations not to be overlooked by the prudent and foresighted in making taxable disposition of property.

Raising out of the estate the amount required for taxes may sometimes be a problem for the legal representation. The writer of a recent article advocates the purchase

of life insurance in a sum calculated to meet such demands, saying:[1]

"In the public prints attention has been called recently to the purchase of insurance in very large sums by prominent financiers, men possessing great wealth, whose individual fortunes are so large that it was quite apparent that the purchase of the insurance by them was not to augment their estates on death. The public announcement then made was that they procured this insurance to provide funds from which the Decedents Estate Taxes could be paid, thus enabling them to transmit their estates to such persons and in such amounts as they might desire, without alteration of their purposes because of the necessary compliance with the provisions of the Decedents Estate Tax. The effort made by them is not an evasion of the taxes, but a provision for the acquisition of cash funds adequate and sufficient to meet tax demands. This effort is particularly praiseworthy, as it tends to relieve the burden, very frequently thrust upon those incapacitated to pay the same, of those taxes which are assessed by the State upon property left by a decedent on his demise. * * *

"In consequence of the multiplicity of taxes and the lessening of estates thereby, any expedient which will relieve the beneficiaries of an estate from the burdens of the tax and pass each estate in its entirety to those for whom it has been accumulated, should receive from those who will leave estates liable to taxation, mature, grave and careful consideration.

"The plan adopted by many wealthy men has been to procure insurance on their lives in an amount commensurate with the liability which will be imposed upon their estates and their beneficiaries at their decease, by the State and Federal Governments. Familiar with the amount of their respective estates, and with the present rate of taxation, an approximation can easily be made as to the sum needed to satisfy the tax. * * *

It is not advisable in any well managed personal affairs, to carry constantly a sufficient sum in bank over and above liabilities, direct and contingent, to enable, in the event of a sudden demise, an exectuor or administrator to have in hand the necessary funds to satisfy tax obligations. Whether the estate be large or small, there is no likelihood that it will continuously have in bank sufficient funds to meet the tax demands. If the estate be small, its size necessarily demands the continued investment of all its funds to obtain adequate income and returns. If the estate be large, its investments are necessarily numerous and widely divergent, and will require ample funds to preserve their stability and character. The continuous retention in bank, of a sum necessary to meet the decedents' estate tax, uncertain in point of time, is repugnant to the business instincts of every conservative, well-balanced, thoughtful business man."

(1) In the Economic World, Jan. 12, 1918.

The author of the article in question, eminent counsel to one of the large insurance companies, is plainly "pumping water to his own mill."

Changing Rates and Criteria.—If proceeds of insurance policies be made payable, by way of reimbursement, to a number of individual beneficiaries, thereby passing entirely without tax under the various statutes now in force, there is no guarantee of the continued grant of such exemption once taxing officials realize the frustation of revenue involved. Furthermore, the ever-changing rates and criteria of such taxation under the various statutes would defy the shrewdest actuary's estimate of the amount of insurance to be so allotted. Added to the difficulties of cutting the insurance to fit the tax and keeping the fit under changing statutes are the further possibilities of intervening deaths of beneficiaries, necessitating constant readjustment and reinsurance. The author elsewhere in his article frankly concedes these and other objections and suggests that the policies be payable to the *estate* of the insured, "with directions in the will that all taxes be paid with the proceeds thereof." Of course if payable to the estate, such funds thereby without question become taxable and since the same uncertainties continue as to the amount of tax required based upon statutes subject to variation from legislature to legislature, neither is there assurance in that case that the proceeds of the most generously conceived policy will suffice to pay *all* taxes

when they have finally accrued upon the death of the insured.

The question, therefore, narrows down and might be stated thus: *"Shall I contract for some insurance so that my taxable estate, thereby increased, may have more funds wherewith to pay part or all of the tax?"* Under the circumstances *one dollar in the bank would seem to be worth two dollars in insurance.* The propertied class to which the suggestion of insurance for the purpose specified is so plausibly addressed no doubt realizes the value of compulsory savings in the insurance plan but continues to be fully aware of the greater profit in personally accumulating a reasonable cash reserve for such exigencies of taxation or otherwise as may arise. The facilities provided by the banks for this purpose are not yet equaled by the insurance companies.

It is not to be denied that it is desirable for the representatives of estates to have some ready cash in hand as soon after they have qualified as possible, for the purpose of paying debts, attorneys' fees and other expenses, the aggregate of which indeed may exceed the amount required for taxes. As yet, however, the suggestion of additional insurance for these requirements has not been made.

Statutes Make Liberal Time Allowance. —As a matter of fact most statutes imposing inheritance or death taxes make liberal allowance of time within which payment may be made less discount if the privilege is granted at all. About one-half of the statutes of the various states allow no discount whatever. Most statutes are likewise longsuffering in allowing time within which payment may be made without infliction of penalty and in some cases no penalty for delayed payment is imposed. Furthermore, most of the various statutes provide for the immediate payment of only that portion of the tax due upon immediately ascertainable beneficial interests, leaving for future payment the tax upon contingent interests.

On the other hand if the tax upon such contingent interests is made presently payable as in New York the statute may be complied with as to such portion of the tax by depositing securities belyonging to the estate, the income meanwhile being payable to the beneficiaries and no cash is required. Under the Federal statute it is proposed that Liberty Bonds be accepted in payment of the estate tax and in that case, who would not prefer the Liberty Bond to insurance? In short, the tax gathering bogey is not apt to be so precipitately or importunately fearful as the insurance solicitor paints him.

Insurance and Bank Deposits. — But granting that necessity arises at the inception of administration for the cash payment of taxes (for instance, under the requirements of some of the notorious "holdup" States) if the assets of the estate are the gilt-edge investments supposed, might not the insurance companies gladly be purchasers from the estate in the emergency? Again, granting that the suggested plan of insurance be favorably considered at all it must be recognized that its appeal is limited to the restricted class of acceptable risks. Those who are not within this favored class must necessarily overcome their repugnance at leaving some ready cash in the banks. So, too, if the insurance rates, applicable at the age when the tired business man ordinarily begins seriously to think of paying his death taxes, leave him dejected, he also must join the line of the rejected at the window of the bank's receiving teller. That line is not likely to grow shorter by reason of the schemes cleverly advocated by the insurance solicitors.

In conclusion it is not apprehended that the volume of bank deposits will be depleted even in case the suggestions of insurance for taxes be generally acted upon. The reserves held by the insurance companies to meet such taxes cannot be left lying around in a bureau drawer awaiting the demise of the insured. The insurance companies must either carry constantly a suffi-

cient sum in bank to meet their obligations to the clamorous tax gatherers or must invest in securities which may need to be realized upon if a sufficient reserve is to be kept intact.

After all it comes down to this: *"Shall I have my representative pay my death taxes or shall I employ and pay the insurance company to do my banking and my tax paying?"*

Jos. F. McCloy.

New York, N. Y.

MASTER AND SERVANT—INJURIES IN COURSE OF EMPLOYMENT.

POLAR ICE & FUEL CO. et al., v. MULRAY.

(Appellate Court of Indiana, Division No. 2. April 2, 1918.)

119 N. E. 149.

Where a servant, employed to check and collect for shortages of master's employes delivering ice, was shot and killed by one of such employes as a result of a quarrel over such collection, such servant's death arose out of the employment.

IBACH, C. J.: While appellee's husband was at work at the plant of appellant another employe shot and killed him. Appellee filed her claim for compensation before the Industrial Board under the Compensation Act, and compensation was allowed.

The only claim made by appellant is that the evidence does not sustain the finding of the Industrial Board that the accident arose out of decedent's employment. The uncontroverted facts are substantially the following: John Mulray, decedent, was employed by appellant to keep a record of ice taken from its ice plant to be sold by its drivers, and to require each to account for the quantity taken out by him when he returned after delivering each load. If there was any shortage it was Mulray's duty to collect the amount of the shortage in cash, and if not collected he then reported it to another bookkeeper, who charged the amount of the shortage against the delinquent driver, and the amount was deducted from his pay. Spencer, the man who shot Mulray, was one of the drivers, and some days before the shooting Mulray had discovered that Spencer was short, and his attention was called repeatedly to it, and a settlement requested by Mulray. On these occasions Spencer would become enraged and accuse Mulray of failing to keep his account accurately, and for some time prior to the fatal shooting he seemed to hold much enmity toward Mulray. On the day of the shooting he (Spencer) had been arguing the matter with the bookkeeper, and as he left her he said, "Yes, and I will fix John (meaning Mulray) too." He then went to the paymaster and argued with him about the pay which he had been given, and from there went to decedent, who was in the "scale office," and there created much disturbance, and sought to do Mulray harm. He there said to him, "You come out and I will fix you." He also called Murray a son of a b——, and Mulray said two or three times, "You call me a son of a b——," and then Spencer said again, "You come out and I'll fix you." Mulray then said, "If you don't get out I will shoot you down," and went to a drawer under the scale and took out a revolver. When Spencer saw it he ran out the door, Mulray following, and as soon as he got out he fired two or three shots. He then returned, saying something about running Spencer up the railroad track. He took out the empty shells, reloaded the revolver, and replaced it. It was one used by the nightwatchman. Spencer went down on Virginia avenue and bought a secondhand revolver, and about one hour later came back to appellant's plant and shot Mulray as he was seated at his desk in the office.

There is also some evidence showing that some of appellant's drivers were rough men, and particularly so on Saturday, pay day, when they generally drank liquor. This was particularly true of Spencer, with whom there had been considerable trouble about other conduct on his part, and he had manifested a malicious disposition. It is conceded by appellant that Mulray's death was the result of an accident received in the course of his employment with it, but the contention is that it did not arise out of such employment.

The rule is well established that a claim for compensation will not be denied simply because the accident occurred by reason of the unlawful and felonious act of some third person, if the employe actually sustained it by being specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him. In other words, when the injury results from the conditions surrounding an employe at the time of the accident and under which he was re-

quired to perform his duties, then generally speaking, it arises out of the employment. Union Sanitary Mfg. Co. v. Davis, 115 N. E. 676

The facts here show that decedent was performing a character of service for his employer which might at any time cause some personal grievance against him on the part of other employes with whom his duties required him to come in daily contact, so that when they were so angered at him or when under the influence of liquor they were liable to do him harm, still he was required to remain at his place of employment, surrounded by these dangers which finally led to and produced his death. Under such circumstances it may very properly be said that the accident which did occur was a risk reasonably incident to decedent's employment.

Appellant relies principally upon the case of Union Sanitary Mfg. Co. v. Davis, supra, in which this court stated the same rule which has been declared by the several courts considering like questions. The facts of that case are clearly distinguishable from the present. There the claimant on his own account provoked a quarrel with another employe in another department, and with whom his employment did not require him to be associated or to come in contact, nor to whom he was required to go with any complaints, and it was made to appear that there was no casual connection between Davis' duties and his injuries. There are other distinguishing features, but this is sufficient. As bearing on some of the propositions now under consideration, the authorities cited in that case, however, are instructive. See, also, United Paperboard, etc., v. Lewis, 117 N. E. 276; In re Loper, 116 N. E. 324. In the case last cited this court said:

"The test to the right to compensation under such acts, in so far as concerns the element now under consideration, is whether the injury resulted from some peril incident to the employment; whether the cause of the injury, although not foreseen, may reasonably be deduced from the circumstances and surroundings peculiar to the place, and under which the workman was required to perform his labors, regardless of whether such perils or surroundings involve negligence on the part of the employer."

The evidence also shows that Mulray was a peaceable man, entertaining no ill will against Spencer, while the latter was of a quarrelsome disposition, and for at least ten days before the shooting occurred as heretofore disclosed by the evidence had made threats against decedent to do him harm, both to him personally and to others. One witness stated, "When ever decedent called his attention to any shortage he got mad and sought a personal encounter with him [Mulray]." Yet it was decedent's express duty to deal with all these drivers daily, and about a subject which might and did often awaken in them a spirit not only of resentment, but of actual antagonism, because it affected a matter of deep interest to them—their pay. In this particular instance it is quite reasonable to infer that the shooting occurred by reason of decedent's persistent endeavor to collect shortages due his employer, and this is particularly true when considered in connection with the character of the man as shown by the record who did the shooting.

While it may be said that the inference that the unfortunate accident in the case was the result of a risk reasonably incident to Mulray's employment, and therefore arose out of his employment, is not the only inference which might be drawn from the evidence, yet it is a very reasonable one, and since the Industrial Board has so concluded we are required to uphold the award.

Award affirmed.

NOTE.—*Assaults on Employe When in Course of Employment Under Workmen's Compensation Acts.*—The instant case is one which shows that American courts are in travail to distinguish injuries to employes under Workmen's Compensation Acts from injuries sustained by them in the ordinary relation of master and servant. As said in the late case Re McNicol, et al., 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A, 306, wherein an employe suffered injury from an assault by another employe, "decisions of English courts before adoption of our act are entitled to weight." This is on the familiar principle, that when one sovereignty embodies into its own law that of another it takes it with prior construction thereof.

The McNichols case held that where an employe was while performing his duties as a checker assaulted by an intoxicated fellow workman, employer was liable. This fellow workman was known by his employer to be in the habit of getting drunk and when in this condition to be quarrelsome and dangerous, but nevertheless was permitted to continue in employment. The court said: "A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion."

This case is distinguished from one where it was held, that an assault by a drunken stranger upon an employe engaged at his work on the highway, where it was held there was no liability of employer. Mitchinson v. Day Bros., 1 K. B. 603, 108 L. T. N. S. 193.

It was said in the latter case that the risk of being assaulted by such a drunken stranger is not in any way especially connected with or incident to the employment of a carter on the highway.

And it was held in two cases that where a stone is thrown in anger by one workman and injures another this does not, under the facts, present a

case of liability by employer. Armitage v. Lancashire & Y. R. Co. (1902) 2 K. B. 178, 86 L. J. N. S. 883; Claytum v. Hardwick Colliery Co., 7 B. W. C. C. 643. The Armitage case construes with strictness the words "out of and in course of employment," saying recoverable injury is that which "as matter of law" arises out of employment, and does not cover mere wrongful act by one against another. "The act does not provide an insurance against everything that may happen to the workman while he is employed." In this case it was said: "The accident arose from an act done by another workman entirely outside of the employment of the man who did the act and of the injured man."

But it has been held that if an assault is likely to happen because of the very nature of the doing of the work by a workman it arises out of his employment.

Thus in Linn Joint Dist. School v. Kelly (1914) A. C. 667, 111 L. T. N. S. 306, the House of Lords held by majority ruling that where an assistant school teacher was willfully injured and killed by school boys under his charge, his mother could recover from his employer for his death.

There were elaborate opinions in this case, the Lord Chancellor, Viscount Haldane, being with the majority. In his opinion he said: "If we are to consider the principle of the *Workmen's* Compensation Act as *res integra* I should be of opinion that the principle was one more akin to insurance at the expense of the employer of the workman against accidents arising out and in the course of his employment than to the imposition on the employer of liability for anything for which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it. I think that the fundamental conception is that of insurance in the true sense."

Lord Reading, agreeing with the Lord Chancellor, said: "If your Lordships were to hold that because a workman was injured by the design of another he was excluded from the benefits of the statute, strange results would follow. The gamekeeper who is set upon by poachers, the warden who is attacked by prisoners, the ticket collector at a railway station who is assaulted by a passenger, the night watchman at a bank who is struck by a thief, are instances of workmen who would be excluded from the right of compensation, if this appeal were allowed notwithstanding that they were injured while performing the duties of their employment. It is difficult to see why the legislature should have drawn this sharp distinction and have provided that while the employer is bound to compensate even the workman whose injury is attributable to his own serious and willful misconduct, he is to escape the payment of compensation to the workman who in the performance of his duties is injured by the design of another."

Some American statutes forbid recovery where injury results from a workman's "own serious and willful misconduct," but does not the idea obtain that if injury might be foreseen from acts, either willful or negligent, and those by a third person are reasonably foreseen or should be, it comes in under the "insurance in the true sense," as expressed by Viscount Haldane?

The injury of which this case treats was by students in charge of the teacher entering into a conspiracy to assault him. The teacher persisted in doing his duty notwithstanding threats of assault. Had he done otherwise there would have been compulsory abandonment of his duties, and demoralization of the school.

In Weekes v. William Stead, Ltd., 111 L. T. N. S. 693, the injury was from assault by a stranger on a foreman who was a furniture mover. He had the duty to select and reject men applying for employment. On his refusal to give the stranger work he was assaulted. There was evidence that the foreman had to deal with men of a rough class among those seeking employment and those in the position of foremen had occasionally been assaulted. The yard where the foreman worked was "an exceedingly rough place." It was therefore thought there was evidence tending to show "a special risk incidental to this employment," and for the injury occurring there was liability. Cozens-Hardy, M. R., referred to Mitchinson v. Day Bros., but distinguished this case from that in that there there was no evidence of a special risk.

It would seem, therefore, that the true test is, that, if an injury is or ought to be foreseen by the master, then if it happens the latter may be liable. This is a rule which appears to us within the spirit of Workmen's Compensation Acts, and that English decision ought to be looked to for guiding cases in the application of this principle. If the anticipation extends to willful acts by others, they come in as well as others.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 149.

Employment; Civic Duty; War—Acceptance of professional employment in respect to claim of exemption from army draft, and of compensation therefor; Not disapproved.—I have lately been consulted by a man who has for thirty years and upwards been a client of this office. He was seeking to secure for his son exemption from military service under the so-called Selective Draft Law. The claims for exemption were of two kinds, one being a matter for the Local Board in the first instance with right of appeal to the District Board; the other being a matter within the original jurisdiction of the District Board. It seemed necessary to supplement by affidavits the official forms issued by the respective boards. No official forms were prescribed for such affidavits.

The employment came to me unsolicited; I had no reason to doubt the good faith of my client; and it seemed to me that the construction of the rather long and involved regulations, the drawing of the necessary dintinctions between matters of original jurisdiction and matters of appellate jurisdiction, and the drafting of affidavits which should set forth facts and not conclusions, were tasks for a lawyer rather than for a layman. I therefore accepted the employment and performed the service. Furthermore, since my client is able and (presumably) willing to pay, I expect in due course to send him a bill for a reasonable fee.

In view of the recent utterance of another Bar Association on this subject, I wish to know whether in the opinion of your committee:

(a) I have acted unprofessionally in rendering the service;

(b) It will be unprofessional to make a reasonable charge for the service.

ANSWER No. 149.

In the opinion of the committee the questions should be answered in the negative.

In reaching this conclusion the committee has been governed by the following considerations:

It is the duty of every citizen to obey the law, and in this hour of the nation's crisis the duty is made more immediate and more imperative only because of the crisis. The President has called upon every citizen to do his full share in uniting the nation in one supreme and effective sacrifice. In answering this call the lawyer has his duty to perform. Primarily he should assist in the enforcement of the law, and give without stint his services to that task. The exemption rules in the selective draft are part of the law. They are in the law not for any individual's private good, but for the good of the nation. Like the provisions for conscription, they are to be observed. In aiding in their observance, in the interpretation of the law, in applying the rules to the circumstances of particular cases so that the law and the facts may be presented to exemption tribunals, the lawyer is merely performing that service for which he is specially qualified and commissioned. In aiding those who eek clear exposition of the law or in aiding those whose cases come before such exemption tribunals we see no ethical impropriety. We take it for granted, of course, that the lawyer will be mindful of the obligations imposed upon him upon these occasions, as upon all others; he will not fail to speak the truth, to defend the weak, to uphold the law, and to see that no injustice is done or error made in the administration of the law. We take it for granted also, that he will not consciously lend himself to the aid of the slacker or the shirker, either with or without pay, nor solicit employment from those seeking exemption. His services should be available only to those who really need his assistance and advice either in determining their rights or their duties under the statute and rules, on in presenting their situation to the proper tribunal.

So far as the matter of compensation for services of this character is concerned, we think that this must be determined by the lawyer individually in each particular case, and that if the lawyer is disposed to give his services gratuitously, he is free to do so as he would in any case justifying gratuitous service.

At a regular meeting of the board of directors of the New York County Lawyers' Association, held October 4, 1917, the following resolution was adopted:

"Resolved, That the Board approves the proposed answer submitted to it by the Committee on Professional Ethics to Question 149, and adopts the same as a correct expression of its views on the subject concerned, and that it be published in the usual manner, including in said publication the action of this Board."

SUPPLEMENTAL ANSWER No. 149.

Since the original answer was formulated and announced the new Selective Service Regulations prescribed by the President under the authority of the Selective Service Law (Act of Congress May 18, 1917) have been made public. These regulations contemplate and establish by Sections 30, 45 and 46 the organization throughout the United States of Legal Advisory Boards "for the purpose of advising registrants of the true meaning and intent of the Selective Service Law and of these Regulations, and of assisting registrants to make full and truthful answers to the questionnaire, and to aid generally in the just administration of said Law and Regulations."

In pursuance of these Regulations Legal Advisory Boards have been formed throughout the United States. The regulations provide (Sec. 30):

"All members of the Bar should make their services available to the Legal Advisory Boards to be constituted by the Governor as hereafter provided."

The Regulations also include the following:

"The Governor shall call upon all members of the Bar within the State, and, if necessary, upon competent laymen to offer their services to such Legal Advisory Boards for the purpose

of being present at the headquarters of the Local Boards and rendering aid and advice to registrants."

And again:

"It should be the pride of every lawyer that no registrant within his district is without competent legal advice and assistance in preparing all papers that such registrant is required to submit in the process of the selection of citizens of this nation for duty in the present emergency."

And again (Sec. 46):

"All lawyers and physicians should regard it as their duty to identify themselves with the Advisory Boards provided for in Sections 44 and 45 and *freely and without compensation* to give their best service to the Nation. It is inconsistent with this duty for lawyers to seek clients for the purpose of urging and advocating individual cases in any other way than as disinterested and impartial assistants of the Selective Service system."

This Committee is of course in the most thorough accord with the principles of these Regulations, parts of which have been quoted herein.

CORRESPONDENCE

MEETING OF THE BAR ASSOCIATION OF HAWAII.

April 3, 1918.

Editor, Central Law Journal:

Yours of March 18th at hand. Would say that the Bar Association of Hawaii will have its annual meeting for the election of officers on Wednesday, May 29, 1918, in the rooms of the Stock Exchange, Honolulu, T. H. The absorbing question during the past few years in Hawaii has been the justification of using the judicial position in Hawaii as the means for paying the political debts of the National Administration. Aside from the general question of the relation of politics to judicial preferment, Hawaii has been agreeably surprised, from time to time, by the calibre of judges bequeathed to it. In all probability, the Bar will further consider ways and means of assisting the National Administration in the present crisis.

Very truly truly,

ALBERT M. CRISTY, *Secty.*

MEETING OF THE ARKANSAS BAR ASSOCIATION.

Editor, Central Law Journal:

Please be good enough to note in the Journal that the date of the meeting of the Bar Association of Arkansas has been changed to May 30 and 31. The date first selected was later ascertained to be the date of the state primary election. The program will consist of the annual address by the president, T. C. McRae, of Prescott, Arkansas, on the subject: "The Lawyer in the Present Crisis." The balance of the program will consist of discussion of the various recommendations of the committees of our Constitutional Convention, which will meet in July.

Yours very truly,

ROSCOE R. LYNN, *Secty.*

Little Rock, Ark.

BOOK REVIEWS.

SCHOULER ON PERSONAL PROPERTY, 5th EDITION.

The first edition of Schouler on Personal Property appeared in 1873. At the time the subject was undertaken it seemed to the author, as Mr. Bishop observed, that law books had not to any great extent treated the law of personal property under a separate head, and such treatment was really a desideratum in legal literature. He therefore essayed to supply that desideratum. He produced a book that took rank as a standard and now in less than fifty years later the fifth edition appears.

Mr. Schouler is the author of many excellent works, all of standard character, and the treatise on personal property has become so well known to the profession that it is a work of superrogation to tell about this enlargement of the earlier editions. Suffice it to say, it brings this subject down to date and annotation of later cases is excellently done, assistance thereto being given by Mr. Arthur W. Blakemore, of the Boston bar. This work is in one volume of nearly 900 pages, is of first-class typographical quality, is bound in buckram and comes from the house of Matthew Bender & Company, Albany, N. Y., as its publishers, with their imprint of 1918.

CORPUS JURIS, VOL. 13.

This most recent volume of the Corpus Juris carries the subject matter of the set alphabetically, down to and including the term "Corporate." This leaves the great subject of Corporations for the succeeding volume.

There are three important treatises in this volume, towit: Contempts, in 108 pages; Contracts, in 584 pages, and Copyright and Literary Property, in 298 pages.

The article on Copyright and Literary Property is one of the best, if not the best, treatise on this subject. It is more exhaustive in decisions on this subject than any text book we have examined and the law is stated with great clearness.

The subject of Contracts is also very thoroughly treated. If any criticism would be justified it would be that the general subdivision is too minute and casual to be scientific. For instance, subdivision XII, Termination and Recission, could more properly be treated as subheads under Discharge, as it is in Austin's simple classification. In the last edition of Huffcutt and Woodruff's Cases on Contracts the author declares that Anson's subdivision is classical, having served as a model for practically all subsequent treatises. Under Anson's classification, there are four outstanding subdivisions: Formation—Operation—Interpretation—Discharge. This with the subdivision of Actions which is omitted in some texts and case-books and included in others forms a skeleton easily retained in mind.

But this criticism, if indeed it is a matter of criticism at all, does not detract from the writer's exhaustive treatment of the subject and the careful and fine distinctions that are made in the notes. Following the policy of Corpus Juris, cases in the notes are not bundled together in large masses but are distinguished both as to fact and principle, thus conserving the time and labor of the practicing lawyer.

Printed in 1263 pages on this paper and published by the American Law Book Company, New York.

BOOKS RECEIVED.

Notes to Statutes of Indiana. A Continuous Supplement to the Statutes of Indiana. 1917. Edited by B. F. Watson, of the Indianapolis Bar. Author of Watson's McDonald's Treatise, Watson's Statutory Liens, Watson's Works, Practice, etc. Subscription price, $4.00 a year. National Annotating Company, Crawfordsville, Ind.

HUMOR OF THE LAW.

An official of the board of health in a town not far from Boston notified a citizen that his license to keep a cow on his premises had expired. In reply to this letter, the official received the following communication:

"Monsieur Bord of Helt—I jus get your notis that my licens to keep my cow has expire. I wish to inform you, M'sieur Bord of Helt, that my cow she beat you to it—she expire t'ree weeks ago. Much oblige. Yours with respeck.

"Pete ———."

—Boston Transcript.

Some years ago there resided at North Judson, Indiana, a lawyer whom we will call Simon, who was not only a good lawyer but was somewhat of a wit and a great wag. One of Simon's clients had given his promissory note to some party in Chicago. The Chicago party, having exhausted all other remedies to collect the note, brought suit in the justice court at North Judson. On the day of the trial a young lawyer came down from Chicago to try the case. He was immaculately dressed; his coat, vest and trousers were of the latest cut, trousers properly pressed and turned up at the bottom, white cuffs and a faultless white tie adorned the gentleman, and across his breast from one vest pocket to the other was a beautiful gold watch chain.

Both Mr. Simon and the Chicago lawyer had visited several of the "thirst parlors," the Chicago lawyer taking a drink or two, and always by himself.

Simon's speech to the jury kept far from the facts in the case, but he won his point. He said:

"Gentlemen of the jury, you all know Simon. Simon's trousers are not pressed, neither are they turned up at the bottom, they bag at the knees. Simon has no new suit, the one he wears you have all known for the last ten years. Simon has no stand-up collar, neither has he a white tie. Simon has no gold chain stretched across his breast, but, gentlemen of the jury, one thing you do know: when Simon has money you all have money, and when Simon drinks you all drink. Did any of you gentlemen drink with plaintiff's attorney when he drank this morning? Not one. I thank you, gentlemen."

It is needless to say that Simon won his case.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Alteration of Instruments**—Materiality.—The addition of a seal after the signature of the maker of a note is a material alteration.—Bowman v. Berkey, Pa., 103 Atl. 49.

2. **Arrest**—Exhibiting Warrant.—Arrest by special constable whose authority is unknown to plaintiff is wrongful when he refuses to exhibit warrant pursuant to plaintiff's request.—Hodge v. Piedmont & N. Ry. Co., S. C., 95 S. E. 158.

3. **Assignments**—Unfinished Work.—Contractor's assignment of 'moneys due' under the contract passed a fund which was not yet payable, but would become payable on securing certificate of completion by the department of water supply, gas and electricity; the work being unfinished.—Hitchings v. Central Electrical Supply Co., N. Y., 169 N. Y. S. 611.

4 **Attorney and Client**—Contingent Fee.—A contract, giving attorney certain contingent fee if case was "tried" in Supreme Court and affirmed, covers situation where appeal was defeated in Supreme Court, although case was not contested there on its merits.—Clancy v. Kelly, Iowa, 166 N. W. 583.

5.——Principal and Agent.—Where attorney acts in good faith, within scope of his authority, in representing his client, his acts of commission or omission will be regarded as acts of his client, and his negligence as negligence of client.—Sayer v. Lee, S. D., 166 N. W. 635.

6. **Bankruptcy**—Adjudication.—Under Bankruptcy Act July 1, 1898, § 70a(5), adjudication in bankruptcy does not terminate or dissolve contractual relations of bankrupt, but vests in trustee option to assume or renounce executory contracts of bankrupt.—In re Berry, U. S. D. C., 247 F. 700.

7.——Discharge.—A bankrupt, by securing the renewal of notes by means of a materially false statement in writing, held to have obtained property thereby, which barred his right to a discharge, under Bankruptcy Act, § 14b(3), as amended by Act Feb. 5, 1903, § 4.—Samet v. Farmers' & Merchants' Nat. Bank of Baltimore, U. S. C. A. A., 247 F. 669.

8.——Proof of Claims.—Holders of the joint and several obligations of the members of a partnership, signed in their individual names, but executed in connection with a partnership transaction, are entitled to prove them against both the partnership estate and individual estates of partners.—Robinson v. Seaboard Nat. Bank of New York, U. S. C. C. A., 247 Fed. 667.

9. **Bills and Notes**—Irregular Indorsement.—Where collateral security of note became unsatisfactory before maturity, one indorsing it as additional security was an "irregular indorser," and assumed an obligation in the nature of a guaranty of the payment of a pre-existing debt.—Zadek v. Forchheimer, Ala., 77 So. 941.

10.——Negotiability.—Where notes given for purchase of lighting plant were to be paid out of percentage of earnings of plant, held, that they were non-negotiable under St. 1917, § 1675—1, subd. 3, requiring negotiable instruments to be payable on demand or at fixed or determinable time.—Bank of Evansville v. Kurth, Wis., 166 N. W. 658.

11.——Negotiability.—Under Negotiable Instruments Act, note is not negotiable if payable to known and existing person unless he indorses it, or, if payee's name is inserted, unless such payee indorses note.—First Nat. Bank v. Wood, S. C., 95 S. E. 140.

12. **Brokers**—Commission.—A letter closing correspondence, whereby vendor authorized brokers to sell his lands, stating that commission would be paid upon all lands listed in such letter, but stating that such was only a partial list of lands vendor had to offer, does not preclude recovery of commission for sale of lands not listed therein.—M. N. Clark & Co. v. Monson, Iowa, 166 N. W. 576.

13. **Carriers of Goods**—Consignment.—Where consignor deposited draft payable to himself and properly indorsed with bill of lading attached with bank, to which consignor was indebted and received credit, held, that consignment was not subject to attachment, as special property passed to bank.—Owensboro Banking Co. v. Buck, Ala., 77 So. 940.

14.——Delay.—Carrier receiving carload of potatoes on afternoon of September 1st, to be transported with "reasonable dispatch," and delivering them at 7 a. m. September 5th, after an intervening holiday and a congestion at its yards, due to a threatened strike, did not breach its contract.—Carr v. Long Island R. Co., N. Y., 169 N. Y. S. 569.

15.——Ratification.—Delivery of shipment by carrier to buyer, if unauthorized, is ratified by shipper thereafter, with knowledge of facts, demanding payment of price from buyer, estopping

shipper to sue carrier for conversion.—Midland Linseed Co. v. American Liquid Fireproofing Co., Iowa, 166 N. W. 573.

16. **Carriers of Passengers**—Licensee.—One at railway passenger station in good faith, waiting for her son, time of his arrival on defendant's train not being fixed, was not mere licensee, and defendant owed her the duty of constructing and maintaining premises in reasonably safe condition.—Himstreet v. Chicago & N. W. Ry. Co., Wis., 166 N. W. 665.

17. **Charities**—Liability for Servant's Acts.—A hospital chartered in Pennsylvania as a charitable corporation is not liable for negligent and unauthorized act of nurse in administering poison to patient, where there was no negligence on part of executive officers.—Paterlini v. Memorial Hospital Ass'n of Monongahela City, Pa., U. S. C. C. A., 247 Fed. 639.

18. **Commerce**—Interstate Employe.—A servant, employed to provide coal and water for locomotives and to aid in moving them about the yards while on their way from Ohio to Michigan or from Michigan to Ohio, held employed in interstate commerce.—Guy v. Cincinnati Northern R. Co., Mich., 166 N. W. 667.

19.——Interstate Employe.—Plaintiff employe in bridge gang, injured while unloading defendant railway's bridge piling from car which had been switched from one to another of defendant's tracks within its yards, held not engaged in "interstate commerce" within federal Employers' Liability Act.—Southern Ry. Co. v. Maxwell, Miss., 77 So. 905.

20. **Common Carriers**—Gratuitous Service.—A person inviting another to ride in his automobile gratuitously was not bound to convey her safely as a "common carrier."—Avery v. Thompson, Me., 103 Atl. 4.

21. **Constitutional Law**—Public Contracts.—Laws 1916, c. 135, § 1, prohibiting board of public contracts from accepting bids for public printing by persons not bona fide residents of and actually engaged in the printing business within the state, does not violate Const. U. S. Amend. 14, relating to equal protection of laws.—Dixon-Paul Printing Co. v. Board of Public Contracts, Miss., 77 So. 908.

22.——Suicide.—Rev. St. Mo. § 6945, declaring that, in all suits upon life policies issued by company doing business in state to citizen of state, it shall be no defense that insured committed suicide unless he contemplated suicide when he applied, held not invalid, as abridging privileges or immunities of citizens of United States, though restricted to Missouri citizens.—Wheeler v. Business Men's Acc. Ass'n of America, U. S. D. C., 247 Fed. 677.

23. **Contracts**—Architects.—In action against architect for failure to properly inspect and condemn defective construction, the contract and architect's testimony as to what he did held to justify the denial of a non-suit, since it was defendant's duty, not only to inspect, but to reject improper materials.—Avent v. Proffitt, S. C., 95 S. E. 134.

24.——Evidence.—Writing on back of photographs submitted for defendant's prize exhibition and acceptance and use thereof, in absence of evidence that defendants' attention was called to indorsements, held not to constitute a contract to pay the valuation indorsed on the photographs in case of failure to return them.—Aland v. Cluett, Peabody & Co., Pa., 103 Atl. 60.

25. **Corporations**—Conveyance.—Provision in Pub. Acts Mich. 1897, No. 230, § 14, that stock of corporation owning and conveying land should be personal property, held not to show that conveyance of land did not carry legal title to grantee.—In re Berry, U. S. D. C., 247 Fed. 700.

26.——Meetings for Elections.—Where articles of incorporation and by-laws authorized board of directors on first Tuesday in February of every second year to elect officers specified, directors who were empowered to change by-laws could postpone meeting for election of officers.—Barker v. National Life Ass'n, Iowa, 166 N. W. 597.

27.——Receiver.—A court of equity may appoint receiver for private corporation discharging public functions to act as caretaker of its assets and allow corporation to gather its resources to discharge obligations and continue operation.—Scattergood v. American Pipe & Const. Co., U. S. D. C., 247 Fed. 712.

28.——Sole Stockholder.—The mere fact that deceased was president and sole stockholder of an insolvent corporation, whose affairs had been not render his purchase of its assets as the turned over to the control of its creditors, did highest bidder at an auction sale, a fraud upon the creditors.—McMullin v. Westinghouse's Estate, Pa., 103 Atl. 57.

29. **Damages**—Computation.—In assessing damages on account of delay, held that, though no extension of time had been allowed by owner's engineers as provided for in contract, yet, as it appeared that such extension would have been granted, damages for contractors' delay must be computed on theory that contractor was entitled to extension.—Firestone Tire & Rubber Co. v. Riverside Bridge Co., U. S. C. C. A., 247 Fed. 625.

30. **Deeds**—Conditional Fee.—Deed to woman "and to the heirs of her body," to have and to hold during her life, at her death "to go equally to her children, should she leave any," and in case she died leaving no child or children, to go to her legal heirs, created conditional fee, and not life estate with remainder to her children.—Branyan v. Tribble, S. C., 95 S. E. 137.

31.——Estate in Land.—Written instrument assigning and dividing six separate tracts among maker's six children, and warranting their title against any claim by the father's representatives or heirs, held not a conveyance of any estate in land.—Dantzler v. Riley, S. C., 95 S. E. 132.

32.——Habendum Clause.—Deed granting lands to plaintiff as trustee, the habendum clause of which was to the trustee, his successors, or assigns, and granting other rights to the trustee and those for whom he holds title, "and his or their assigns," created a power in the trustee to sell.—Crawford v. El Paso Land Improvement Co., Tex., 201 S. W. 233.

33.—Intention.—Though words in deeds "on this condition," and in provision relating to forfeiture in case of failure to pay when demanded, are words ordinarily used to create a condition, breach of which will result in forfeiture, such will not be effect if contrary intention is manifested in deeds as whole.—Amory v. Trustees of Amherst College, Mass., 118 N. E. 933.

34. **Divorce**—Soliciting Return.—Where husband had repeatedly asked wife to go back and live with him, and her expressions and conduct indicated that further efforts to induce her to return would be unavailing, husband held excused from making further efforts.—McCauley v. McCauley, N. J., 103 Atl. 20.

35. **Equity**—Demurrer.—Motion to dismiss decree appointing receiver rendered on bill praying appointment is essentially a demurrer, and court cannot go beyond facts pleaded.—Scattergood v. American Pipe & Const. Co., U. S. D. C., 247 Fed. 712.

36.——Fraud.—One whose business enterprise is based upon deliberate fraud will not find a court of equity as strenuous to preserve all his rights as he might have, if his conduct and motives had been honest.—Peninsular Chemical Co. v. Levinson, U. S. C. C. A., 247 Fed. 658.

37.——Evidence.—Where defendant counterclaimed on account of plaintiff's fraud in inserting in conveyance agreement to assume payment of mortgage, defendant must establish fraud by clear and satisfactory preponderance of evidence, though no reformation of instrument is asked.—De Groot v. Veldboom, Wis., 166 N. W. 662.

38.——Tender.—Defendant could not destroy plaintiff's cause of action predicated on fraud committed by the defendant by misrepresenting his title in the sale of the property by tendering, after the right of action had accrued, a complete title to the property.—Berry v. Wooddy, Ala., 77 So. 942.

39. **Frauds, Statute of**—Assumption of Debt.—Where partner buying interest of another agreed that new firm would assume the old firm's obligations and the other continuing partner signed the contract as a witness, this satisfied the statute of frauds, Civ. Code, § 1238, subd. 2.—Jansen v. McNamara, S. D., 166 N. W. 630.

40. **Gaming**—Gaming Device.—Assortment of goods including punch board for distribution which purchaser of collar button worth five cents for ten cents was entitled to punch, and which entitled him to premium if number on slip punched corresponded with number placed opposite any premium, was a "gambling device" within statute.—Grove Mfg. Co. v. Jacobs, Me., 103 Atl. 14.

41. **Highways**—Proximate Cause.—In action for injuries from collision between motorcycle and automobile, plaintiff cannot recover, when his willfulness contributed as proximate cause, to his own injury, even though defendant was willful.—Spillers v. Griffin, S. C., 95 S. E. 133.

42. **Indictment and Information**—Demurrer.—Under the approved practice in the courts of the United States, questions which can as well and better be raised at the trial should not be raised by demurrer, especially in view of Rev. St. § 1025 (Comp. St. 1916, § 1691).—United States v. Werner, U. S. D. C., 247 Fed. 708.

43. **Injunction**—Contempt.—Where, at suit of waterworks company in federal court, municipality was temporarily restrained from supplying water to inhabitants, and it enacted ordinance vacating franchise of waterworks company and began suit in state court, held, that officials and attorneys participating in enactment of ordinance should not be adjudged guilty of contempt in violating spirit of order.—Shuler v. Raton Waterworks Co., U. S. D. C., 247 Fed. 634.

44. **Innkeeper**—Negligence.—That hotelkeeper knew that entrance steps and platform were covered with freezing snow and slush, and did not clear them within 3½ hours after snow stopped falling, and allowed a departing guest to use them in that condition, justified finding of his negligence.—Cooper v. Reinhardt, N. J., 103 Atl. 24.

45. **Insurance**—Insurable Interest.—A mortgagor who has sold the premises being still liable for mortgage debt has an insurable interest in the property.—Lumbermen's Nat. Bank of Menominee, Mich., v. Corrigan, Wis., 166 N. W. 650.

46.——Place of Contract.—Insurance policy issued by Missouri company to resident of California and accepted by him in that state held California contract, so that reliance might be had under California laws on stipulation against liability in case of death by suicide, though such defense was not available under laws of Missouri.—Wheeler v. Business Men's Acc. Ass'n of America, U. S. D. C., 247 Fed. 677.

47.——Relief Association.—Under constitution of firemen's relief association, fireman, who, while exercising horses, was thrown from wagon and had shoulder dislocated, resulting in permanent injury disqualifying him as fireman or to work at manual labor, for which alone he was competent, held entitled to benefits from association.—McClarence v. Providence Permanent Firemen's Relief Ass'n, R. I., 103 Atl. 1.

48. **Landlord and Tenant**—Abandonment.—Option to purchase contained in lease is not abrogated by parties making purchase agreement containing different terms of payment which they later abandoned by mutual consent, and continued to pay and receive rentals under the lease.—Thommen v. Smith, N. J., 103 Atl. 25.

49.——Priority.—Wife of tenant's lodger held not in such privity with tenant that stipulation in lease as to repairs by tenant would apply to lodger's wife and preclude here recovery from landlord under Civ. Code La. art. 2322, for collapse of a gallery railing.—Hero v. Hankins, U. S. C. C. A., 247 Fed. 664.

50. **Limitation of Actions**—Federal Employers' Liability Act.—In action under federal Employers' Liability Act, where petition was filed and summons served within two years from injury, action was not barred, although more than two years had elapsed between injury and date of amendment of summons.—Martinson v. Chicago, B. & Q. R. Co., Neb., 166 N. W. 624.

51. **Marriage**—Evidence.—In action for husband's death, where defendant alleged that plaintiff was not deceased's lawful wife, it was error to admit in evidence marriage of man of similar name and the divorce decree rendered after the alleged marriage of plaintiff and deceased, without evidence deceased was the defendant in divorce suit.—Allen v. McIntosh Lumber Co., Miss., 77 So. 909.

52. **Master and Servant**—Accidental Injury.—Where collector for brewery was intentionally shot and killed for purpose of robbing him of company money, there was "accidental injury,"

within Workmen's Compensation Law, § 29.—Spang v. Broadway Brewing & Malting Co., N. Y., 169 N. Y. S. 574.

53.——Compensation.—Where widow of deceased servant obtains compensation for his death, decree should contain clause stating in express terms effect of act that weekly payment is to cease upon death of dependent before expiration of period of payment.—In re Derinza, Mass., 118 N. E. 942.

54.——Defective Appliances.—Hammer and cleaver being tools furnished by employer for use of its employes in its business, are a part of its "plant," within Code 1907, § 3910, subd. 1, making employer liable for injury to employe from defect in condition thereof.—Sloss-Sheffield Steel & Iron Co. v. Hopson, Ala., 77 So. 920.

55.——Dependency.—Under Workmen's Compensation Act, if award for death of servant is to be made to both parents, relative extent of dependency individually must be found, and award to them jointly is improper.—In re Pagnoni, Mass., 118 N. E. 948.

56.——Dependency.—Where a girl had lived over 15 years with grandparents, continuously since a few days old, her parents, in separating, having given her to them by written agreement, she was entitled, as dependent on her grandfather, to be compensated under the Workmen's Compensation Act for his death.—In re Yeople, N. Y., 169 N. Y. S. 584.

57.——Employers' Liability Act.—Employers' Liability Act of 1911 does not authorize a recovery for injuries sustained by servant without negligence of master or his agents, and such negligence still remains essence of liability.—J. Wooley Coal Co. v. Tevault, Ind., 118 N. E. 921.

58.——Friendly Aliens.—Aliens who are residents of friendly nations and who are dependents and otherwise within terms of Workmen's Compensation Act, are not barred from compensation.—In re Derinza, Mass., 118 N. E. 942.

59.——Hazardous Employment.—Collector for a brewery, killed in saloon away from plant, was within protection of Workmen's Compensation, § 3, subd. 4, as amended by Laws 1916, c. 622, as to hazardous employment.—Spang v. Broadway Brewing & Malting Co., N. Y., 169 N. Y. S. 574.

60.——Permanent Loss.—Under the Employers' Liability Acts (Rev. St. 1913, § 3662, subd. 3), fixing the compensation for loss of a leg, and providing that permanent loss of use of leg shall be equivalent to loss of leg, compensation for permanent loss of use of leg, unaccompanied by other physical injury or loss of health, cannot exceed fixed amount.—Hull v. United States Fidelity & Guaranty Co. of Baltimore, Md., Neb., 166 N. W. 628.

61.——Respondeat Superior.—Restaurant foreman employed to maintain order among waiters and employes and authorized to discharge an employe, is not necessarily authorized to inflict corporal punishment or personal violence, and master will not be liable therefor without evidence that he has directed or authorized it.—Allertz v. Hankins, Neb., 166 N. W. 608.

62.——Volunteer.—Teamster in employ of cotton mills company, having no duties in company's ginhouse, was not entitled to recover from the company for injuries received there while, as a volunteer, he was assisting a fellow servant.—Melton v. Cohannet Mills, S. C., 95 S. E. 135.

63.——Workmen's Compensation Act.—Wife who remained in Armenia while husband came to America and worked here continuously until death was not living with husband at his death within Workmen's Compensation Act, and was not conclusively presumed to be totally dependent, but dependency must be determined under part 2, § 7.—In re Mooradjian, Mass., 118 N. E. 951.

64. **Mortgages**—Multiplicity of Suits.—Upon mortgage foreclosure, where both mortgagor and his purchaser had taken out insurance on the property, intending losses to be payable to the mortgagee, and loss occurred, it was proper under the Code to interplead the insurance companies as defendants to avoid multiplicity of suits.—Lumbermen's Nat. Bank of Menominee, Mich., v. Corrigan, Wis., 166 N. W. 650.

65.——Surrender Clause.—Mortgage clause, that mortgagor should hold premises until default in payment, did not imply agreement to surrender after default, which warranted appointment of receiver upon mortgagee's application, in absence of pledge of rents and profits.—Josey v. Smith, S. C., 95 S. E. 133.

66. **Municipal Corporations**—Evidence.—In action for injuries in automobile collision, where defendants alleged the car involved was not theirs, and that they were present in their office, and a witness said he was in their office and received a check at the time of the accident, the check was admissible.—Figueroa v. Madero, Tex., 201 S. W. 271.

67.——Extension of Boundaries.—Where a city, in ignorance of the fact that territory described was included within the boundaries of an incorporated town, extended its boundaries so as to include such territory and the incorporated town was later dissolved and thereafter the city again extended its boundaries, the city was not liable for the debts of the town.—Fabric Fire Hose Co. v. City of Vicksburg, Miss., 77 So. 911.

68.——Unguarded Sidewalk.—Where a lot owner constructed a sidewalk, leaving an unguarded hole to light his basement for 21 days, the city must be held to have notice of such defective condition.—Gellenbeck v. City of Mobridge, S. D., 166 N. W. 631.

69. **Negligence**—Dangerous Position.—While person cannot justify his remaining in dangerous position to save property, yet he should not abandon property to injury on ground of self-preservation, until it appears that it is reasonably necessary to avoid receiving injuries.—Brien v. Detroit United Ry., U. S. D. C., 247 Fed. 693.

70.——Gratuitous service.—Where steel company without charge and for accommodation of family and relatives of deceased employe had its engine and flat car, used exclusively in its business, carry remains, members of family, and relatives to and from cemetery, plaintiff, who without invitation or request, got on car and made return trip, held not entitled to recover for injuries sustained while getting off car.—Laxton v. Wisconsin Steel Co., Ky., 201 S. W. 15.

71.——Invitee.—One inviting another to take a ride in his automobile held required to exercise the degree of care and caution which is reasonable and proper, and not to expose her to unnecessary peril.—Avery v. Thompson, Me., 103 Atl. 4.

72.——Intervening Cause.—Where a paving company maintained an asphalt boiler, with a faucet for withdrawing the substance, and at some distance therefrom a sand pile, upon which children played, and an infant in going to the sand pile was burned when the faucet loosened and fell out, the falling out of the faucet was a proximate intervening cause unforeseen.—Sexton v. Noll Const. Co., Miss., 95 S. E. 129.

73.——Res Ipsa Loquitur.—Where ice box lid fell on customer's hand in defendant's store, doctrine of res ipsa loquitur raised presumption of defendant's negligence.—Higgins v. Goerke-Kirch Co., N. J., 103 Atl. 37.

74. **Principal and Agent**—Evidence.—That an alleged agent solicited freight and talked about claim adjustments is not proof of authority to receive notice of claims against railroad, in absence of proof of authorization.—Midland Linseed Co. v. American Liquid Fireproofing Co., Iowa, 166 N. W. 573.

75.——Power of Attorney.—One having power of attorney from mortgagee giving right to act generally in settlement of all claims against named company and more particularly to payment of certain mortgage notes secured by mortgage on launch, although he could foreclose mortgage and take possession of launch, had no power, after having purchased launch at foreclosure sale, to sell it.—Larson v. Hodge, Wash., 171 Pac. 251.

76. **Railroads**—Contributory Negligence.—Where motor car which deceased was driving became stalled on defendant's track at a crossing, and his companion alighted to crank car, deceased cannot, though he remained in car for a short time after seeing defendant's interurban car approaching, be deemed guilty of contributory negligence because his choice proved un-

wise.—Brien v. Detroit United Ry., U. S. D. C., 247 Fed. 693.

77.——Crossing.—Railroad company held no more bound to keep tracks, crossings, and premises safe for infants than for adults, unless by course of conduct it establishes a status for children imposing greater care.—Louisville & N. R. Co. v. Steele, Ky., 201 S. W. 43.

78.——Crossing Accident.—In action for injury from collision of automobile and train at crossing, railroad's liability may rest on its negligence in allowing weeds and brush to grow on its right of way so as to obstruct vision of those in automobile approaching the crossing.—Burzio v. Joplin & P. Ry. Co., Kan., 171 Pac. 351.

79.——Guarding Crossing.—Where tracks of railroad within populous city have been used as a road for ordinary travel to extent that it is likely that there are persons upon track, duty arises to keep a lookout and guard against wantonly or willfully inflicting death or injury on any one, including trespasser.—Louisville & N. R. Co. v. Ganter, Ala., 77 So. 917.

80.——Look and Listen.—Where vehicle driver injured by locomotive at grade crossing, testified that he stopped and looked before attempting to cross the tracks, but did not affirmatively state that he listened, whether he did was for jury, and it was error to direct a nonsuit.—Waltosh v. Pennsylvania R. Co., Pa., 103 Atl. 55.

81.——Ordinary Care.—Where motorman in charge of interurban car either sees or by reasonable care should see that traveler rightfully on crossing cannot or apparently will not remove himself therefrom in time to avoid being struck, and motorman fails to stop his car, although able by ordinary care so to do, and thereby injures traveler, motorman is guilty of negligence. —Brien v. Detroit United Ry., U. S. D. C., 247 Fed. 693.

82. **Receivers**—Priority.—Holders of certificates issued by receiver of insolvent corporation to obtain funds to pay taxes, etc., to prevent forfeiture of leasehold in valuable realty, held not entitled to any priority over claims of lessors for rent subsequently accruing.—Ball v. Improved Property Holding Co. of New York, U. S. C. C. A., 247 Fed. 645.

83. **Removal of Causes**—Separable Controversy.—Where declaration in action in state court, in which resident and non-resident were joined as defendants, states cause of action, there is no separable controversy which nonresident can remove to federal court.—Baker v. Jacksonville Traction Co., U. S. D. C., 247 Fed. 718.

84. **Sales**—Breach of Contract.—For breach by vendee, damages are measured by difference between agreed and market price at time of breach, with interest, at place of delivery, or if goods are to be specially manufactured, and have not yet been manufactured, difference between contract price and cost of production.—Jebeles & Colias Confectionery Co. v. Crandall-Pettee Co., Ala., 77 So. 932.

85.——Future Shipment.—Buyer of grain for future shipment may refuse to recognize seller's cancellation of executory contract, wait until expiration of shipping period, and then purchase in open market and recover difference between contract price and market price paid at stipulated time and place of delivery.—Fahey v. Updike Elevator Co., Neb., 166 N. W. 622.

86. **Street Railroads**—Contributory Negligence.—Where plaintiff's truck driver, though ignorant of tracks on street which he approached at right angles, could have seen car before collision was imminent, and could have seen poles and wires, verdict was properly directed for railway.—Beaver Valley Milling Co. v. Interurban Ry. Co., Iowa, 166 N. W. 565.

87.——Contributory Negligence.—Driver of auto, struck by slowly moving street car, having deliberately turned to cross track, when he could for some time have seen car, was contributorily negligent.—Yetter v. Cedar Rapids & M. C. Ry. Co., Iowa, 166 N. W. 592.

88. **Telegraphs and Telephones**—Mistake in Transmission.—Telegraph company is agent of sender, who is bound contractually to sendee by any mistake in transmission, though sendee, under proper circumstances, may maintain action against telegraph company for damages.—Des Arc Oil Mill v. Western Union Telegraph Co., Ark., 201 S. W. 273.

89.——Rates.—Where a Pacific cable company with terminus in San Francisco had as its chief customers two telegraph companies, its requirement of one telegraph company that to its messages there be added the words "via San Francisco" and the date of acceptance, to be paid for at the regular toll rates, was unreasonable. —Western Union Telegraph Co. v. Commercial Pac. Cable Co., Cal., 171 Pac. 317.

90. **Trusts**—Laches.—The failure of a complainant to bring a suit to enforce a trust within the time limited by the state statute of limitations held to bar him of relief in a federal court of equity.—Benedict v. City of New York, U. S. C. C. A., 247 Fed. 758.

91.——Perpetuities.—Where two deeds created valid trust for benefit of college, and trust for benefit of grantor and descendants named was invalid under rule against perpetuities, trust in favor of college will be supported, though trust for grantor and representatives fails.—Amory v. Trustees of Amherst College, Mass., 118 N. E. 933.

92. **Vendor and Purchaser**—Fraud.—Where lands were sold for orchard purposes under agreement that vendor would plant and cultivate them for five years, representations of vendor held, if false, to be fraud within Rev. Codes, § 4978, defining actual fraud.—Como Orchard Land Co. v. Markham, Mont., 171 Pac. 274.

93. **War**—Trading with Enemy.—Act Oct. 6, 1917, defining, regulating, and punishing trading with enemy, must be construed in light of purposes, first, to prevent act resulting in detriment to United States in war, and, second, not to permit or compel act resulting in injury to individual alien enemy without benefit to United States.—Keppelman v. Keppelman, N. J., 103 Atl. 27.

94. **Waters and Water Courses**—Agency.— That companies carrying water by canals from reservoir of irrigation company were agents of irrigation company and not of its customers was not established by fact that some officers of irrigation company and carrying companies were the same, or that irrigation company occasionally allowed employe of carrying company to turn water into extension ditches.—Hood v. Burlington Ditch, Reservoir & Land Co., Colo., 171 Pac. 371.

95.——Enforcing Rates.—Water company has right to enforce payment of water bill by shutting off water, but if bill is not just, it is liable for damages.—Birmingham Waterworks Co. v. Davis, Ala., 77 So. 927.

96. **Wills**—Annulment.—In will reading, "To P. I leave all I die possessed of," erasure at place where word "die" was written held not important or cause for annulling the will, under Rev. Civ. Code, art. 1589.—Succession of Walker, La., 77 So. 889.

97.——Children.—Granddaughter of testator, whose mother died before him and who was not named in a will, held not entitled to take under provisions that issue of children dying in his lifetime should take share which deceased child would have taken, etc.; provision referring to gifts to named children.—Holloway v. Collee, U. S. D. C., 247 Fed. 599.

98.——Construction.—Under will providing that if devisees died while their children were under age their children should have rents and profits until they attained majority, and if they died before that time estate should revert, grandchildren held to take only rents and profits until they attained majority when their estates terminated.—Morgan v. Staton, Ky., 201 S. W. 304.

99.——Remainder.—In bequest to child for life with remainder to her "heirs," but, if she died without "heirs," remainder to go to testator's brothers and sisters, word "heirs" means children, and is a word of purchase and not of limitation.—Walden v. Smith, Ky., 201 S. W. 302.

100. **Witnesses**—Wife.—In prosecution for violation of Mann Act, where it was charged that accused feloniously induced his wife to go from one place to another in interstate commerce for purpose of prostitution, wife is competent witness.—Denning v. United States, U. S. C. C. A., 247 Fed. 463.